ORIGINAL

Before the
Federal Communications Commission

In re the matter of	)	
	)	
Children's Television Obligations	)	MM Docket No. 00-167
Of Digital Television Broadcasters	)	
	)	

To: The Commission

PETITION FOR RECONSIDERATION

UNIVISION COMMUNICATIONS INC.

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SUMMARY

Univision seeks reconsideration of two aspects of the Commission's rules as adopted in the Report and Order: (1) the prohibition on the display of Internet website addresses in commercials aired during children's programs if the websites contain the appearance of program characters, and (2) the Commission's determination that core educational and informational programs that are preempted more than 10% of the time in a quarter cannot count as "core" programs, even if rescheduled.

In using the term "host-selling", the Commission has not adequately defined what character appearances are prohibited in the Internet context. Even if adequately defined, the ban on "host-selling" places an undue burden on broadcasters to constantly monitor the websites of advertisers. Because websites can be modified at any time, even the most vigilant monitoring cannot prevent a violation of the rule. Moreover, the regulation burdens the speech of advertisers, but the Commission has not articulated a substantial governmental concern for imposing this burden on broadcasters and advertisers. Thus, the regulation raises serious First Amendment concerns as well. Even setting aside this Constitutional defect, however, because the rule seeks to regulate advertisers and their activities on the Internet, it also exceeds the Commission's statutory authority.

With regard to the Report and Order's restriction on the preemption of children's educational programming, the Commission's 10% preemption rule does not provide broadcasters with adequate flexibility in scheduling to meet the needs of all viewers, particularly with respect to the scheduling of coverage of unique events such as the World Cup. To provide the requisite flexibility, the Commission should (1) calculate compliance with the 10% preemption limit on an annual rather than on a quarterly basis; (2) count a program as preempted only if it is not aired in

a substitute timeslot with on-air notice of the schedule change occurring during its regular timeslot; and (3) modify the current exemption for preemptions caused by breaking news to include other types of live coverage of major (i.e., sporting) events.

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Univision Communications Inc. ("Univision"), through its attorneys and pursuant to Section 1.106 of the Commission's rules, hereby seeks reconsideration of certain aspects of the Commission's Report and Order and Further Notice of Proposed Rule Making[1] in the above-captioned proceeding. Specifically, Univision seeks reconsideration of two aspects of the Commission's rules as adopted in the Report and Order: (1) the prohibition on the display of Internet website addresses in commercials aired during children's programs where the websites do not meet the Commission's standards, and (2) the Commission's determination that core educational and informational programs that are preempted more than 10% of the time in a quarter cannot count as "core" programs, even if rescheduled. Both of these restrictions impose an undue and harmful burden on the operations of television stations and the networks that serve them. Further, the prohibition on displaying Internet website addresses is an impermissible effort to extend the Commission's host-selling policy beyond the breaking point, while impermissibly regulating website content in violation of the First Amendment and in excess of the Commission's statutory authority.

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[1] Children's Television Obligations of Digital Television Broadcasters, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-221 (2004) ("Report and Order").

I. The Prohibition on the Display of Internet Website Addresses for Websites that Include Character Images Unduly Burdens Programmers and Stations, While Undermining the Availability of Programming For Children

The Report and Order purports to merely apply the existing commercial limit restrictions contained in the Children's Television Act[2] to situations in which Internet website addresses are displayed during children's programming or in the commercials aired during that programming. One way in which the Report and Order does so is to establish a four-part test to determine whether a website is acceptable to the Commission, effectively requiring websites to restructure themselves if they wish to be allowed to display their addresses during children's programs.[3] The Report and Order states that websites meeting the four-part test are free to advertise and sell on the commercial portion of their websites merchandise related to the program in which their website address appears.[4] However, in two short sentences, the Report and Order appears to render this freedom to advertise and sell merchandise completely illusory by establishing a requirement that is highly burdensome, if not impossible, for any broadcaster to comply with.[5]

Specifically, the Report and Order states:

> Because of the unique vulnerability of young children to host-selling, however, we will prohibit the display of website addresses in children's programs when the site uses characters from the program to sell products or services. This restriction on websites that use host-selling applies to website addresses displayed both during program material and during commercial material.[6]

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[2] Children's Television Act of 1990, 47 U.S.C. §§ 303a, 303b, 394.

[3] Report and Order at ¶50.

[4] Report and Order at ¶51.

[5] It is also noted that it appears that the four-part structure mandated by the Report and Order cannot realistically be achieved because it does not provide for a means by which one can navigate from the noncommercial to the commercial portions of the site.

[6] Id.

The full impact of what these two sentences attempt to restrict cannot be known because the Commission has not defined what is prohibited "host-selling" in the Internet website context. In cases applying the host-selling prohibition in the context of broadcast programming, the Commission has found that the appearance of a program character in a commercial for an unrelated product constitutes host-selling.[7] It has additionally stated that the host-selling policy would "prohibit the depiction of a cartoon character such as Sonic the Hedgehog, in a children's program to sell a product in close proximity to that program."[8] Since the broadcaster has no way of knowing whether the Commission would consider an appearance of a character on a website to be "proximate," it must proceed on the assumption that the Commission will make such a finding and assume that any character appearances on websites constitute prohibited "host-selling."

Under this definition, a website for a toy store might be considered to engage in "host-selling" if the website, which is designed to promote the toy store, displays a picture of a plush doll or an action figure of a program character or a picture of a CD or DVD where program characters are seen on the cover. Such a restriction on being able to display the wares a website intends to sell belies the Commission's statement that websites making the effort to meet the Commission's four-part test will be rewarded by being able to advertise and sell products related to programs.

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[7] See e.g., Licensee of WTTE, Channel 28 Licensee, Inc., 15 FCC Rcd 1903 (MMB 2000) (Appearance of character "Bobby" in the background of a commercial promoting a comic book expo constitutes host-selling); Liability of Ramar Communications, Inc., 12 FCC Rcd 20490 (MMB 1997) at n.9(Appearance of Tale Spin characters in McDonald's commercial is host-selling).

[8] KCOP Television, Inc., DA 97-324 (February 12, 1997).

Even assuming the Commission is eventually able to precisely define "host-selling" in the Internet context, trying to comply with such a prohibition places a considerable burden and cost on every broadcaster and advertiser airing commercials in children's programming, even to the point of risking the availability of abundant children's programming in the marketplace. To have any chance of complying with this rule, all commercials would have to be screened for the appearance of website addresses. If a website address is displayed during a particular commercial, and in Univision's experience, nearly every commercial includes a website address these days, the website would have to be reviewed for the appearance of any program characters and a determination made as to whether those characters could be engaging in "host-selling." This process would involve clicking through hundreds of website pages and performing multiple site searches in order to develop a level of comfort, but not certainty, that no "host-selling" is occurring on the website.

Moreover, the "comfort level" thus developed would be completely ephemeral because the advertiser could modify its website at any time to add new products which feature program characters. Thus, programmers and stations that attempt to monitor websites are left wondering how often they should review the content of the website, knowing that even if they visit every website every day, they would still not be guaranteed compliance because the advertiser might revise its website between inspections. The burden on broadcasters to continually monitor and police the content of thousands of websites for instances of "host-selling" is immense. Beyond being a hopelessly futile activity, the vast resources broadcasters would need to expend as "Internet Content Cops" could be far better spent on programming or community affairs efforts.

In addition, as the FCC has no jurisdiction over those advertisers or their websites, the most a broadcaster could do upon finding a non-compliant website is to threaten to remove the

website reference (assuming it is contractually able to do so) for future airings. Under these circumstances, advertisers have little if any incentive to modify their websites until a broadcaster actually raises the issue, and can easily game such an enforcement system by adding program characters to their websites after the advertising contracts are signed, or even routing incoming Internet traffic from the broadcast station at issue to a "character-free" version of the website. Even the most diligent and best-intentioned broadcaster will find itself in violation of such a rule sooner or later.

Faced with such a daunting task, the only realistic way for a broadcaster or programmer to comply with the Commission's rule is to ban all Internet website addresses from commercials in children's programming. Univision's experience with advertisers to date raises concerns that implementation of such a ban might result in a loss of advertiser support for children's programs. That outcome clearly conflicts with the careful balance between limiting children's exposure to commercial matter and providing a financial basis for children's programming that Congress adopted in the Children's Television Act.[9] Congress recognized that unduly restricting advertising in children's programming would ultimately decrease the amount and quality of children's programming available. Congress therefore chose to place a reasonable limit on the number of minutes of commercials that can air during children's programs, rather than bar advertising in children's programming altogether. A prohibition on the display of website addresses disrupts that balance, while depriving even adults viewing such programming of what has become the single most useful aspect of advertising—a web address where an interested consumer can find out more about the product or service in which he or she is interested.

[9] See 47 U.S.C. § 303a, Note (referencing Section 101 of Pub. L. 101-437). See also, H.R. REP. 101-385, 1990 U.S.C.C.A.N. 1605, 1621 (1990).

Nor does Univision believe that securing edited versions of commercials that have eliminated the display of the website address is a practical solution. Beyond the hesitance of advertisers to pay to air advertising lacking a key piece of consumer information, or to create a special version of an ad for the sake of being able to run it during a particular children's program, the Commission's decisions regarding the program length and host-selling rules are replete with examples of violations caused by simple human error in airing the wrong commercial at a particular time. Indeed, the burden of keeping separate copies of advertisements that are identical in all respects except with regard to the display of an Internet address, and the risk of confusing those separate versions is simply too great.

II. Extension of the Host-Selling Policy to Internet Websites Is Neither Justified Nor Legally Permissible

While it is clear that compliance with the "host-selling" prohibition imposes a tremendous burden on broadcasters, the need for the regulation and the benefit it is to engender are far from clear. The Commission premises its prohibition on showing an Internet website address, if that website includes pages where the image of a program character can be seen, on the "unique vulnerability of young children to host-selling."[10] In adopting the original regulations implementing the Children's Television Act of 1990, the Commission described the prohibition on host-selling as:

> a special application of our more general policy with respect to separation of commercial and program material. The separation policy is an attempt to aid children in distinguishing advertising from program material. It requires that broadcasters separate the two types of content by use of special measures such as "bumpers" (e.g., "And now it's time for a commercial break, " and "And now back to the [title of the program]").[11]

[10] Report and Order at ¶51.

[11] In the Matter of Policies and Rules Concerning Children's Television Programming, Report and Order, 6 FCC Rcd 2111, 2127 n.147 (1991).

When applied to character appearances on television, the prohibition on host-selling prevents the uninvited intrusion of a character with a commercial message into a child's television viewing where the child, having no control over when this intrusion will occur, may be unable to separate the character's commercial message from its programming appearance. The website context, however, is substantially different. In order for the child to be exposed to the character's commercial message, the child must first be of an age that he or she can read the website address displayed, recall the address, and actively pursue the character's commercial message by affirmatively initiating contact with the Internet website. The act of logging onto the Internet involves numerous intervening activities such as potentially leaving the place where television viewing occurred, moving from the television to a computer (in most cases), logging on or seeking the assistance of an adult to log onto the Internet, and finally navigating to the advertised website. Each of these actions provides separation from the commercial the child saw containing the website address and any character images that the child sought out on the website. Clearly, the Commission's website rule cannot be characterized as a legitimate restriction designed to prevent host-selling/inadequate program separation.

Instead, what *is* being restricted is the enticement of viewers through advertising to visit a site where they may encounter images of a program character and offers to sell products associated with that character. The exposure of children to these images and products on Internet sites is remote in time and place from the broadcast program itself, and requires an additional volitional act on the part of the child and parent to bring about exposure to the content that appears to concern the Commission. The Commission's restriction on such website references therefore substantially exceeds its authority to regulate broadcasters in the public interest, and

instead focuses on regulating entirely legal economic activity outside the Commission's authority while intruding upon the First Amendment rights of advertisers' commercial speech.

To appreciate the enormous leap this new prohibition places on legitimate commercial activity unrelated to broadcasting, the reader should review the first sentence in the paragraph above: "*What is being restricted is the enticement of viewers through advertising to visit a site where they may encounter images of a program character and offers to sell products associated with that character.*" While the reader may have implicitly read "*web*site" into that sentence, the logic is equally applicable to a *geographic* site. However, the Commission would be hard pressed to support a restriction on advertising for geographic sites (i.e., Toys R Us) where, upon a child and parent taking the volitional step of visiting that physical site, they will no doubt encounter dolls and many other toys directly associated with program characters, and be enticed to purchase those items through in-store marketing displays featuring that character.

With the World Wide Web increasingly serving as many advertisers' storefront (and in many cases, their only storefront), the Commission's restriction on website references in advertisements is both an overreaching effort to restrict legitimate commercial activity, and an unnecessary regulation that discriminates against web-based businesses while ignoring identical marketing efforts by brick and mortar advertisers.

To the extent the Commission may posit that this discrimination is justified by the notion that accessing a website is easier for a child than visiting a store, the facts do not support such a premise. First, both activities are far, far removed from the Commission's desire to separate program material from commercial matter, the concern that engendered the host-selling policy. The separation in the Internet context is obvious, requiring the viewer to establish an Internet connection on their computer, locate the website, and then locate the pages showing the program

character. There is nothing surreptitious or subliminal about an advertisement including such a web address, thus eliminating the normal host-selling concern that children cannot tell the commercial aspect of the program from the program's entertainment aspect. The character appearances prohibited by the Commission's new rule are in fact not part of the program at all, creating the ultimate in program separation.

Second, obtaining access to the Internet requires not just a volitional act on the part of the child, but of the parent as well, who must arrange (and pay for) such access before the child can visit a website, and who is therefore also in a position to control the child's web access, just as he or she typically can control the child's access to Toys R Us. To the extent a child might access the Internet at a friend's house, that child might just as easily access Toys R Us with the friend's family or a relative. In either case, the "exposure" to program characters is the same, and far removed from the broadcast program itself.

In short, whether the Commission's website restriction is viewed as (1) extending the host-selling policy beyond the breaking point; (2) attempting to regulate in the virtual realm a legitimate commercial activity that it clearly could not regulate in the physical realm; or (3) discriminating against web-based commercial activity in violation of Congress's stated goal to promote Internet commerce and the growth of the Internet,[12] the regulation is clearly impermissible and beyond the Commission's authority. To the extent that it drives advertisers away from supporting children's programming through their advertising dollars, it is also a short-sighted policy with no countervailing benefit.

While a regulation lacking any logical or empirical basis that also imposes substantial burdens on the entities regulated would normally fail court review as being arbitrary and

[12] Internet Tax Moratorium Act, Pub. L. 108-155 codified at 47 U.S.C. §151, Note.

capricious, or just plain outside the Commission's authority, the fact that a great portion of the burden here lies in the restriction of protected commercial speech creates a First Amendment issue as well. Because the Report and Order presents no substantial governmental interest for restricting such speech, the prohibition on the display of website addresses is not just statutorily defective, but also constitutionally defective.[13] For all of these reasons, the Commission should eliminate the rule before it harms broadcasters and advertisers, and threatens the economic viability of the very programming the Commission seeks to promote.

III. Limiting Program Preemptions to 10% Per Quarter, and Counting Programs as Preempted Even If Rescheduled, Deprives Broadcasters of the Flexibility Necessary to Serve All Segments of Their Community, While Encouraging Them to Cease Airing an Educational Program Entirely in Any Quarter Where More Than One Preemption Is Unavoidable

In the Report and Order, the Commission established a 10% ceiling on preemptions of core educational children's programs each quarter, stating that any program preempted more

[13] As the Commission is aware, government restrictions on commercial speech are scrutinized under the four-part test established by Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 566 (1980). First, under the Central Hudson test, commercial speech must concern a lawful activity and not be misleading in order to be protected by the First Amendment. Id. The second prong of the test requires that the governmental interest in prohibiting that speech must be "substantial." Id. Even conceding a substantial government interest in protecting children from character appearances on Internet websites, the Commission has the burden under the third prong of the Central Hudson test to show that the restriction on speech "directly advances" that interest. Id. This burden is a heavy one. As the Supreme Court stated: "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Feld, 507 U.S. 761, 770-71 (1993). The heightened burden reflects the Supreme Court's view that "this requirement is critical." Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995). Finally, a restriction on commercial speech cannot be "more extensive than is necessary to serve" the asserted government interest. Central Hudson, 447 U.S. at 566. The Supreme Court has "made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002).

than 10% of the time in a quarter will not count as a core program for that quarter.[14] At the same time, the Commission ruled that even programs that are not preempted entirely, but moved to a nearby timeslot, are counted against the broadcaster in calculating the 10% ceiling.[15] The cumulative effect of these two provisions is to vastly reduce the flexibility of stations to serve all segments of their audience. While the Commission partially recognized the need for flexibility in exempting preemptions caused by breaking news, there are other preemptions that also occur for valid public interest reasons, yet would run afoul of the 10% rule.

For example, over the past decade, Univision has been fortunate to secure the exclusive U.S. Spanish-language broadcast rights to the World Cup Soccer Championship, which occurs every four years. As can be imagined, there is a considerable following among viewers of all ages and from all backgrounds in this event. It occurs over one month in the summer and, being live programming, frequently must either preempt children's programming or require that the children's programming be aired at a different time. Under the Commission's 10% rule, all Univision affiliates would lose all credit for all children's programming aired during the entire quarter in which the World Cup occurs because of these preemptions and schedule shifts. In this situation, a broadcaster is given no incentive to reschedule the preempted children's programming, or for that matter, to even air that children's programming at all during the entire quarter, since the station will be deprived of all "credit" for that programming for the entire quarter anyway. However, the scheduling flexibility and incentives necessary to prevent such a result can easily be incorporated into the rule on reconsideration with minor changes.

[14] Report and Order at ¶41.

[15] Id.

First, the Commission should calculate compliance with the 10% preemption limit on an annual rather than a quarterly basis (i.e., permitting six preemptions over four quarters, rather than the current three preemptions over two quarters). This will ensure that the overall goal of educational programming being "regularly scheduled" is achieved, but not by unduly limiting a broadcaster's ability to schedule around important events. For similar reasons, the Commission should also count a program as preempted only if it is not aired in a substitute timeslot with an on-air notice of the schedule change occurring during its regular timeslot.

Finally, the Commission should modify the exemption for preemptions caused by breaking news to include other types of live coverage of major (i.e., sporting) events. Given the extremely strong interest in the Hispanic community for soccer, live game coverage could practically be construed as breaking news coverage. It is therefore important that the Commission not unduly restrict broadcasters from making such public interest judgments. It would be a substantial disservice to the public to force broadcasters to forego airing such important and occasional events (for example, the Olympics) because of overly-rigid regulation. Broadcasters are not seeking credit for educational children's programming that is in fact preempted, but they should not lose credit for the educational programming they do air merely because they responded to the public's demand for coverage of important events that fall outside the Commission's current news exemption.

By making these minor changes, the Commission will continue to ensure that educational programming is available, but not at the expense of the broadcaster's flexibility to serve all segments of the public as dictated by outside events whose scheduling is beyond the control of the broadcaster. As the Commission itself has stated, "Licensees are afforded broad discretion in the scheduling, selection and presentation of programs aired on their stations, and Section 326 of

the Communications Act and the First Amendment of the Constitution prohibit any Commission actions which would improperly interfere with the programming decisions of licensees."[16]

Conclusion

The Commission's prohibition on the display of addresses for Internet websites on which program characters appear is unduly burdensome on broadcasters, involves the Commission impermissibly in regulation of the Internet and advertisers in excess of its statutory authority, and impinges on the First Amendment rights of advertisers without advancing a substantial governmental interest. Univision urges the Commission to eliminate this rule on reconsideration in order to avoid harm to broadcasters and advertisers, and to preserve the availability of children's programming. Similarly, the Commission's 10% limit on preemptions of core educational children's television programs unduly limits broadcasters' discretion to schedule programming to meet the needs of all segments of the public. Univision therefore urges that this restriction be modified on reconsideration to preserve that flexibility.

Respectfully submitted,

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[16] Dr. Paul Klite, 12 Comm. Reg. (P & F) 79 (MMB 1998) (denying petition to deny license renewals of several television stations) aff'd by McGraw Hill Broad. Co., Inc., 16 FCC Rcd 22739 (2001).